

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT AUGUSTUS ELLINGTON,

Defendant-Appellant.

UNPUBLISHED

March 11, 2008

No. 274890

Berrien Circuit Court

LC No. 06-401495-FC

Before: Fitzgerald, P.J., and Smolenski and Beckering, J.J.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, and the trial court sentenced him to a prison term of 12 to 40 years. Defendant appeals as of right. We affirm.

Defendant challenges only the sufficiency of the evidence presented at trial. This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational jury could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

A conviction for second-degree murder requires the proof of (1) a death (2) caused by an act of the defendant (3) who acted with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Defendant challenges the sufficiency of the evidence only with respect to the element of malice.

“Malice” means that the defendant intended to kill or to inflict serious bodily harm, or intended to create or knowingly created a very high risk of death or serious bodily harm, knowing that death or such harm would likely result from his actions. *People v Abraham*, 256 Mich App 265, 269-270; 662 NW2d 836 (2003). The defendant need not actually desire to kill or inflict harm; the prosecution must only prove that the defendant intended to commit an act “that is in obvious disregard of life-endangering consequences.” *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citations omitted). A trier of fact may infer malice from the facts and circumstances of the killing, including the use of a knife or other deadly weapon. *People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999); *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

The victim in this case is defendant's daughter, Albertneshia. On the night of the killing, defendant's girlfriend told police that defendant said he was going to kill Albertneshia after she hit him with a telephone receiver. While defendant was arguing with Albertneshia, he took a butcher knife from the top of a kitchen cabinet and placed it on the stove within his reach. Defendant brought the knife with him from the kitchen when he subsequently confronted Albertneshia in the living room. Defendant stood over Albertneshia as she sat on the floor, wedged between a loveseat and the wall, and stabbed her with the knife. Defendant's other daughter, Lakeshia, screamed at defendant, saying, "Don't kill my sister," and she tried to pull defendant away from Albertneshia, but he was "too strong." Defendant stabbed Albertneshia at least three times. Testimony was presented that defendant had to use considerable force to penetrate Albertneshia's sternum with the knife. This evidence, viewed in the light most favorable to the prosecution, was sufficient to allow a rational jury to conclude that defendant stabbed Albertneshia in obvious disregard of life-endangering consequences. *Werner, supra; Harris, supra.*

Defendant also claims that the evidence more properly supported a conviction for voluntary manslaughter. A conviction for voluntary manslaughter requires proof beyond a reasonable doubt that (1) the defendant killed in the heat of passion; (2) he was adequately provoked; and (3) insufficient time elapsed for a reasonable person to control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Even assuming that evidence was presented from which the jury could have concluded that defendant was provoked and acted in the heat of passion, the determination of whether the provocation was so great that a reasonable person would lose control is a question of fact for the jury. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The jury was free to believe or disbelieve, in whole or in part, the testimony presented at trial. *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). We will not second-guess the jury's determination of witness credibility and reweigh the evidence. *Wolfe, supra* at 514.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering